FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1836

COOPERS & LYBRAND,
Petitioner,
v.
CECIL LIVESAY and DOROTHY LIVESAY,
Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,
Petitioners,
v.
CECIL LIVESAY and DOROTHY LIVESAY,
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On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

Punta Gorda Isles, Inc., Wilbur H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas, D.D.S.

WILLIAM A. RICHTER
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
Counsel for Petitioners Punta Gorda Isles, Inc., Wilbur H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas

LEWIS R. MILLS
PEPER, MARTIN, JENSEN, MAICHEL and HETLAGE
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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ARGUMENT

I

The Brief for Petitioners Punta Gorda Isles, Inc., et al. (hereinafter referred to as "Petitioners' Brief") advanced the following argument: (a) 28 U.S.C. § 1291 permits an appeal only from

"final decisions"; (b) the question of finality under the death knell doctrine is treated as a question of fact; (c) the correct and just resolution of questions of fact depends on the existence of adequate procedural safeguards that will ensure a full opportunity to develop and present evidence; (d) the minimum procedural safeguards necessary for an accurate and fair resolution of fact questions, safeguards perhaps mandated by due process, include notice, a hearing with an opportunity to present evidence, and perhaps an opportunity to discover evidence prior to the hearing; (e) such procedural safeguards were not provided in this case, in which there was neither a hearing nor any opportunity to present or to discover evidence regarding finality; and, therefore, (f) the denial of these procedural safeguards is by itself sufficient reason to reverse the decision of the Court of Appeals in this case. (Petitioners' Brief, pp. 7-12)

The Respondents do not address the need for procedural safeguards that must be provided if this Court accepts the death knell doctrine. Rather, the Respondents seek to avoid this critical question of fair procedure by the simplistic argument that the evidence in the record in this case supports the finding made by the Court of Appeals. In so doing the Respondents blithely ignore the following facts: (a) the finding was based on bits and pieces of evidence that were offered at various times for other wholly unrelated purposes; (b) the district court never addressed the issue of finality or heard evidence specifically presented on that issue; (c) the presence in the record of some evidence that might support the Court of Appeals' finding does not insure or even imply that the finding was accurate or that it was fairly reached.

Moreover, the Respondents completely disregard the important question of what additional evidence the record might have contained if an opportunity had been afforded the parties to develop and present evidence on finality.

Even if the resolution of the finality question were restricted to the meager evidence on that issue contained in the record, the Respondents pass over the most relevant evidence: The Respondents' former counsel, in sworn testimony, stated that other members of the class were willing to finance the continued prosecution of the case (A151-153). The Court of Appeals should not have decided the issue of finality without permitting Petitioners to discover and to offer additional evidence on the role of those other class members in financing this litigation, and it erred when it did so.

II

The Court of Appeals also erred in focusing its inquiry into finality on the size of the Respondents' individual claims. In this case, and in most class actions, the size of the individual claims of the would-be representative plaintiffs has little or no bearing on the finality of an order denying class action status. In all cases it will be financially possible for the plaintiffs to prosecute their individual claims and then appeal the class action ruling. The possession of such financial resources by the plaintiffs must be assumed, because otherwise they could not adequately represent the class. The real issue, therefore, is not whether it is impossible for the plaintiffs to prosecute their individual claims before they appeal from the class action decision. It is, rather, whether that course is financially so unattractive to the plaintiffs that they will abandon their case after the adverse ruling on the class action issues.

Respondents dismiss as "sheer speculation" the Petitioners' analysis of how a plaintiff would decide whether to continue to prosecute after an adverse decision on the class action question. But Respondents in the same breath in effect concede the Petitioners' premise that the "finality" of an order denying class action status depends upon an analysis of the risk-reward ratio

by [redacted] the plaintiffs and their counsel; they state that the Petitioners' analysis

> deserves little weight as against the concrete reality of the substantial resources which would have to be expended in prosecuting the individual claim to a conclusion before an appeal on the class question could be taken, and the risk of a total loss of such resources and denial of attorneys' fees if class status is not ultimately restored. (Respondents' Brief, footnote, p. 37)

For a plaintiff to be forced to delay his appeal from the class action decision until after a final decision on the merits involves some obvious risk to the plaintiff. There are, however, risks in all litigation. Even if the plaintiffs had prevailed in the district court on the class action issues, they would face substantial risks on the liability issues. The risk to the plaintiffs involved in a delayed appeal on the class action issues is certainly not of a different order of magnitude than the risk associated with the liability issues or the other risks commonly faced in litigation. Yet both plaintiffs and defendants in other kinds of cases face those comparable risks without need of a non-statutory and interlocutory appeal.

In short, a district court ruling on the class action issue adverse to the plaintiffs does increase the risk to the plaintiffs. The critical question is whether that increase so alters the plaintiffs' analysis of the risks and potential rewards that they will abandon their claims. For the reasons stated in the Petitioners' Brief (pp. 13-19), that question cannot be answered by looking only to the size of the plaintiffs' individual claims, their financial resources, and the probable cost and complexity of the lawsuit. Even if this Court does not reject the death knell doctrine, it should rule that the Court of Appeals erred in this case by too narrowly restricting the scope of that inquiry.

This Court should, however, reject the death knell doctrine and rule that a mere increase in the risk faced by the plaintiffs,

regardless of the magnitude of that increase, does not convert an interlocutory order into a "final decision." For purposes of § 1291, finality should not be measured by the effect of the decision on the plaintiffs' volition.

III

Rejection of the death knell doctrine would postpone an appeal from a class action decision until after the decision on the merits, *i.e.*, until after an unquestionably "final" decision, or would require the plaintiffs to seek certification under 28 U.S.C. 1292(b) for an interlocutory appeal. Postponing that appeal would require the plaintiffs to assume an economic risk that they could avoid if an immediate appeal was permitted. However, the purpose of the class action device is not to remove all economic risk from would-be representative plaintiffs. It is merely to provide a forum in which their claims for themselves and on behalf of the class can be determined. For the plaintiff who is willing to undertake the risk, that forum is available without death knell appeals.

The additional economic risk imposed on the plaintiff by postponing his appeal from an adverse class action ruling until a final judgment on the merits does not overweigh the principles behind the statutory mandate of § 1291; that additional risk does not warrant making class actions even more complex by creating the procedures necessary to implement the death knell doctrine fairly. The death knell doctrine should be rejected.

CONCLUSION

The Respondents' Brief meets none of the arguments made in the Petitioners' Brief. The Respondents do not discuss the procedure by which "finality" can be determined if the Court accepts the death knell doctrine. Nor do they demonstrate any fallacies

in the Petitioners' analysis of the factors to be considered in determining finality. Indeed, they acknowledge that that determination must be based upon the plaintiffs' individualized risk-reward analysis. The Respondents do not attempt to balance the cost of accepting the death knell doctrine (as measured by the additional procedural complexities involved in a fair determination of finality) against the minimal gains to be achieved by that acceptance (relief of would-be representative plaintiffs from some economic risk). The Court should decide that the gain is not worth the cost and reject the death knell doctrine. Even if the Court does not reject the doctrine, however, the judgment of the Court of Appeals must be reversed, because of the failure to require a hearing on the issue of finality and because of the unduly narrow inquiry that was made into the question of finality.

Respectfully submitted,

WILLIAM A. RICHTER
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
Counsel for Petitioners Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., and John W. Douglas

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